

DOCUMENT RESUME

02689 - [A1792806]

[Protest against Award of Sole-Source Contract]. B-188799. June 15, 1977. 5 pp. + enclosure (1 pp.).

Decision re: Lawyers Co-Operative Publishing Co.; by Robert P. Keller, Acting Comptroller General.

Issue Area: Federal Procurement of Goods and Services:

Definition of Performance Requirements in Relation to Need of the Procuring Agency (1902).

Contact: Office of the General Counsel: Procurement Law I.

Budget Function: National Defense: Department of Defense - Procurement & Contracts (050).

Organization Concerned: West Publishing Co.; Department of the Army.

Authority: B-186855 (1977). B-178740 (1975). 53 Comp. Gen. 139.

A protest was made to the award of a sole-source contract by the prior sole-source contractor. The agency determined that the sole-source supplier's copyrighted indexing system would facilitate legal research despite protester's incumbency for 26 years. The agency needs changed, and protester could not meet them. The contract signed by the protester and awaiting agency signature was cancelled. Publication in "Commerce Business Daily" of notice to procure from a new supplier, and no other formal notice to incumbent, did not render the subsequent award fraudulent. The protest was denied. (DJM)

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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-188709

DATE: June 15, 1977

MATTER OF: The Lawyers Co-Operative Publishing Co.

DIGEST:

1. Award of contract on sole-source basis cannot be said to be without rational basis where agency determines sole-source supplier's copyrighted system will facilitate legal research notwithstanding protester held contract for 26 years because agency has discretion to change contractor if it finds its needs have changed and protester, prior sole-source supplier, cannot meet those needs.
2. While agency could have been more open with protester in release of information, failure of agency to advise protester, prior sole-source supplier, other than through public notice in Commerce Business Daily of sole-source negotiation with new supplier does not render subsequent award fraudulent. Fact that agency had completed sole-source negotiations with protester and protester had signed contract and returned to contracting officer for signature is not objectionable as Government has right to cancel solicitation and not make award where needs have changed substantially.

The Lawyers Co-Operative Publishing Co. (LCP) has protested the award of contract No. MDA-903-77-D-0023 by the Department of the Army to West Publishing Company (West).

The contract is for the editing, printing and distribution of the slip opinions of the Court of Military Appeals. For the past 26 years, LCP has held the contract for this requirement. In August 1976, the Army began negotiations on a sole-source basis with LCP for its fiscal year 1977 requirements. The Determination and Finding (D&F) to support the sole-source negotiation with LCP stated that the use of formal advertising was not practicable because adequate competition was not available and that the expertise gained by LCP during past performance and LCP's copyrighted digest system has given LCP an insurmountable competitive advantage.

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On September 28, 1976, a contract was sent to LCP by the contracting officer for signature. This was returned signed on October 1, 1976, by LCP. During this timeframe, the Army was advised by LCP that a "Request to Show Cause" letter had been issued to LCP by the Defense Supply Agency for alleged deficiencies in the firm's affirmative action plan required by Executive Order No. 11246.

The Army, between October 1, 1976, and November 15, 1976, changed its requirements with regard to the opinions of the Court of Military Appeals. These changes, according to the Army, resulted from meetings to ascertain what action to take while the status of LCP as a Government contractor was unsettled. First, it was determined that the opinions would be processed in-house pending the award of a contract. Then a discussion ensued concerning a review and reassessment of the contract requirements and the requiring activity and the court advised that it had long considered a need to have the opinions indexed to the West Key Number System and made a part of West's National Reporter System to facilitate research and make the opinions available to the public. Following these discussions, the procurement requirement was changed and West was requested to submit a sole-source proposal because the key number system was copyrighted. On January 17, 1977, West submitted its proposal and following negotiations, award of a contract to West was made on March 29, 1977.

LCP's protest of this award action is based on the contentions that the contract was required to be awarded competitively as there were at least two acceptable sources and that the Army improperly considered LCP an ineligible bidder because of the deficiencies in its affirmative action plan in contravention of certain regulations.

On May 25, 1977, LCP filed Civil Action No. 77-242 in the United States District Court for the Western District of New York styled The Lawyers Co-Operative Publishing Company v. Harold Brown, Secretary of Defense, et al., for a temporary restraining order (TRO) and preliminary and permanent injunction restraining defendants from performing the contract awarded to West. The same date the

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court issued the requested TRO until such time as our Office renders its decision in the matter.

Regarding the second issue of protest, in his report to our Office regarding the protest, the contracting officer made the following statement:

"7. The Lawyers Cooperative Publishing Company apparently feels that the only reason the contract was not awarded to it was the Government's belief that it was non-responsible as a result of the Show Cause Notice. While the Show Cause Notice was the basis for not awarding the contract in October 1976, the change in the procurement requirement was the sole reason the firm was not considered with regard to the contract under protest. At no time was the concern that Lawyers Cooperative Publishing Company might become ineligible for future Government contracts a factor. The statement in Defense Supply Service-Washington's letter of 28 March 1977 (referred to in paragraph 9 of page 3 of the firm's protest) was in response to that firm's letter of 16 March 1977, implying that, in some way, Defense Supply Service-Washington was remiss in performing its functions. Thus, once the change in the requirement occurred, the status of Lawyers Cooperative Publishing Company, so far as eligibility to receive awards of Government contracts, was not a factor for consideration."

Accordingly, as the contracting officer states that LCP's eligibility did not influence the decision to negotiate sole source with West, we will decide the first basis of protest as if LCP was eligible for the award of a contract at the time the determination was made to change the requirements of the procuring activity.

Our Office has consistently held that the drafting of specifications to meet the Government's minimum needs is properly the function of the procuring agency and will not question an agency's determination unless it is shown that the determination has no rational basis. Sanders Associates, Inc., B-186855, January 3, 1977, 77-1 CPD 1.

The Army has stated that the need for the West Key Number System was required because the Court of Military Appeals relies more heavily now on Federal criminal precedents than in the past and that the West system would index both military and civilian cases in the same manner thus facilitating research. Also, the West National Reporter System would make the decisions of the court more widely available and, therefore, the civilian segment of the public would be better informed concerning the military criminal system.

LCP disputes the above rationale, contending that the decisions of the court are indexed and included in that firm's other legal publications and, therefore, are readily available to researchers and the public. LCP further argues that since its services were satisfactory to the Army for 26 years, the determination by the contracting officer that West was the sole source of supply was obviously in error.

However, we cannot say that the Army's determination that only West could satisfy its needs was without a rational basis, since it is indicated that it finds the copyrighted key number system a more effective legal research tool than the LCP system and that it will facilitate research. Winslow Associates, B-178740, May 8, 1975, 75-1 CPD 283. While an agency may have received satisfactory service from a company over a period of years, the agency still has discretion to change contractors if it finds that its needs have changed and the current contractor cannot meet those needs. Accordingly, our Office has no objection to the award to West.

LCP further contends that the Army committed a fraud upon it when it sent LCP a copy of the contract, which resulted from the negotiations, which was signed and returned by LCP and then held by the contracting officer during the negotiations with West. LCP states it contacted the Army several times during this time period but was never advised of the negotiations with West.

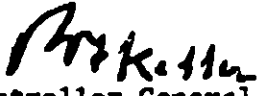
The Army responds that it announced its intention to negotiate with West in the Commerce Business Daily (CBD) of November 24, 1976, and that the proposal of LCP expired on December 1, 1976. Therefore,

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the Army contends it fulfilled any duty it had to LCP with the public notice in the CBD and thereafter could not have made an award to LCP under its expired proposal.

While it appears from the record that the Army never advised LCP of the intent to change the requirements and negotiate with West, other than through the notice in the CBD, this failure does not affect the validity of the award to West. The Government always has the right to cancel a solicitation and not make an award when its needs have changed substantially. 33 Comp. Gen. 139 (1973). While the Army could have been more open and straightforward in its release of information to LCP, its actions did not amount to a fraudulent award.

Accordingly, the protest is denied.


Acting Comptroller General
of the United States



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

James Vickers
Per I.

JUN 15 1977

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The Honorable Harold P. Burke
United States District Judge
United States District Court for the
Western District of New York

Dear Judge Burke:

This is in regard to the temporary restraining order you issued on May 25, 1977, in connection with The Lawyers Co-Operative Publishing Company v. Harold Brown et al. (Civil Action No. 77-242).

Enclosed is a copy of our decision of today concerning the propriety of the award by the United States Army of a contract to West Publishing Company.

Sincerely yours,

R.T. KELLER

Acting

Comptroller General
of the United States

Enclosure